the sum of $3,500 on or before 31st October, 1938, the receiving and adjudication orders will be set aside and the proceedings upon the bankruptcy petition will be stayed pending the decision of the appeal.

Each side set up too absolute a case before the Judge below. The issue appears to have been discretion or no discretion. The question of terms or conditions on which the proceedings might be stayed appears from the papers before us not to have been raised.

Each side has had some measure of success in this appeal. There will be no order as to costs.

Order accordingly.

Solicitors for appellant:—
John G. Campbell & Co.

Solicitors for respondent:—
Johannes & Sammy.

[COURT OF CRIMINAL APPEAL]
McELWAINE, C.J., MILLS & PEDLOW, JJ.
August 29, 1938.

REX v. ONG CHOON.

[SINGAPORE CRIMINAL APPEAL No. 25 of 1938]

The Penal Code (Cap. 20), s. 300—Culpable homicide not amounting to murder—S. 80—Accident in the doing of a lawful act—Question not clearly left to the jury by trial Judge.

A defence however weak and whether raised in evidence or even in a statement from the dock or by way of explanation must be left to the jury. Any point on which there is evidence which may afford a defence should be drawn to the attention of the jury, even if the defence has not raised it and even if it is inconsistent with the defence.

CRIMINAL APPEAL.

Taylour for appellant.

Butterfield, Crown Counsel, for the Crown.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

The judgment of the Court of Criminal Appeal (**McELWAINE, C.J., MILLS & PEDLOW, JJ.**) was delivered by—

McELWAINE, C.J.—The appellant was charged with the murder of one Lim Sua Kow and on his trial was convicted of culpable homicide not amounting to murder and was sentenced to six years rigorous imprisonment.

He appealed with the leave of a Judge against his conviction and the only ground of appeal argued before this Court was that the accused at his trial raised as a defence that Lim Sua Kow had met with his death by accident and that this defence was not put, or was inadequately put, to the jury.

A defence, however weak and whether raised in evidence or even in a statement from the dock or by way of explanation must be left to the jury, *Dinnick*, 3 Cr. App. Rep. 77. *Richards*, 4 Cr. App. Rep. 161. *Hill*, 7 Cr. App. Rep. 26. Any point on which there is evidence which may afford a defence should be drawn to the attention of the jury, even if the defence has not raised it *Rex* v. *Hooper*, (1915) 2 K.B. 431; 11 Cr. App. Rep. 136 and even if it is inconsistent with the defence *Rex* v. *Thorpe*, 41 T.L.R. 468; 18 Cr. App. Rep. 189. The judge has great freedom in pointing out to the jury the value of the evidence or the improbability of the defence provided he puts the defence fairly to the jury. Further, if there is no evidence which might reduce a charge of murder to a lesser offence the judge should not leave the question of the lesser offence to the jury. *Rex* v. *Phillips*, 32 T.L.R. 414, *Rex* v. *Thorpe* (*supra*). The principal evidence in the Crown case was a dying deposition made by the deceased to a magistrate in which he said he was asleep in bed when he awoke feeling the accused kneeling upon him and cutting his throat and that in defending himself he got cut in the arms and chest. Medical evidence was given of the wounds on deceased. Besides the severe cut on the throat which was the cause of death, there was an incised wound severing the abdominal muscle, and incised wounds on the palm of the left hand, and on the left forearm besides minor abrasions. The doctor thought the wounds consistent with the deceased's story.

The accused made a statement to a magistrate in which he gave a different version of the tragedy. He said there was a dispute with the deceased about a debt he owed the deceased, that the deceased seized a chopper and struck him on the hand between the thumb and forefinger. The accused had in fact such a wound on his right hand. The accused said in his statement to the magistrate that in the course of the struggle the chopper accidentally cut the deceased's neck.

The accused gave evidence on oath in which he told a somewhat different story but adhered to his main defence of which he gave greater detail.

"When I was holding his hand in which he had a knife he attempted to snatch the knife with the other hand. By so doing he hurt himself in the palm. There was a struggle for possession of the knife. We were pushing about. He attempted to push the knife towards my chest. I attempted to push it back to him. I then told him to throw away the knife. He refused, and he said he wanted to take my life. I repeated the words requesting him to throw away the knife as there was no enmity between

us. He refused to listen to me. The struggle went on and more injuries were caused on his body which bled. I was hurt here, between the thumb and the right forefinger. As I was anxious to get away from him I released his hand. He was trying to free himself with all his might and when I released him he inflicted some injuries in his neck. When he received the wound he fell down on his back. He shouted for help twice."

The accused was cross-examined:

"Q. How do you account for these cuts on his left arm?

"A. Well, I was holding his right hand with my hands. I wanted to get the knife from his right hand, and thereby caused the injuries on his left forearm.

Q. And you do not think that if a man was holding a knife and was getting all those wounds on his hand and his stomach, that he would not have dropped the knife?

A. He could not have dropped the knife, because I was holding his grip.

Q. Do you want the Court to believe that you were holding his knife and pushing the knife into him?

A. I was using both of my hands against his hand in which he had the knife.

Q. You mean that you in fact, caused those wounds on him by turning the knife on the deceased?

A. Yes, in self-defence; I had to look after my own life.

Q. And you never got a wound at all?

A. Yes.

Q. Except a little wound at the back of your hand?

A. Yes.

Q. Now coming to the throat wound: You have heard the doctor say he did not think it could have been caused as your counsel suggested?

A. Why not, if he did not do it himself, I would not have come to this Court.

Q. Assuming your story is correct and the cut throat was accidental.....

A. Yes, accidental.

Q. And it was done with no intention at all of causing any harm, then why did not you if that were the case, go to the neighbours and tell them all about it immediately?

A. I was scared.

Q. Why were you scared?

A. I cannot say why I was scared.

Q. Supposing your story was true, when you went to Ng Ah Meng's place to smoke opium with him why did not you tell him?

A. I was scared.

Q. Did he ask you how you got the cut on your hand and the blood on your trousers?

A. Yes, he did.

Q. Why did you tell him it was because you had fallen over a wall?

A. I was afraid to tell him the truth so I put a false story to bluff him.

Q. I suggest to you, that what happened on this night was that you were staying there as a guest of the deceased and that you were sleeping on the same sleeping platform.

A. No.

Q. And that you got up and deliberately cut his throat with that knife.

A. If I got up and cut his throat deliberately, I would have cut his neck at least half-way through.

Q. You heard the doctor say you cut his neck practically through to the spine?

A. That might be so, but the force he used in putting back the knife.....

Q. He was lying down when you did that, and he struggled?

A. No, I deny that.

Q. And he tried to defend himself?

A. No.

Q. And that is how he got the cuts on his left arm?

A. No, my Lord, he got those injuries at the beginning of the struggle.

Q. And therefore, that is why he had so many cuts on him and you had none on you?

A. Well, I have demonstrated to the Court how I received those injuries, and I have nothing more to say.

Q. I suggest that you got that cut at the back of your hand not in defending yourself, but when the knife slipped when you were hacking at this man?

A. It is impossible that this sort of wound could have been caused by the back of the knife."

The chief aim of counsel for the defence appears to have been to reduce the charge from murder to culpable homicide not amounting to murder, by stressing exceptions 1, 2 and 4 to s. 300 of the Penal Code—grave and sudden provocation, private defence and sudden fight. Counsel did not mention accident but ended a description of the struggle for the knife in these words:

> "They struggle. Then the deceased tries to free his right hand. The prisoner resists and then he lets go, and the momentum or the impetus of the prisoner having let go of the right hand of the deceased, gives impetus to the cut, which has been given in evidence."

The summing-up as to onus of proof was adequate. The learned Judge cautioned the jury against the danger of taking the dying deposition at its face value.

The Judge put two points of view to the jury —that based on the deceased's statement and that based on the accused's evidence. He concluded "Now this case, you see, depends certainly on two opposing sets of facts. If you accept one set of facts, murder. If you accept the other set of facts, culpable homicide not amounting to murder. Any doubt that you may have, you must give the benefit of it to the accused, and you have to be satisfied on the Crown evidence that it is murder also."

Mr. Storr who represented the Crown then said:

> "There is just one point occurs to me; that if it was a pure accident?"

His Lordship:

> "I do not think he makes out that it was pure accident. A man who is holding both his hands on the arm of another man who has a knife in his hand attacking him, you could not very well say that that is pure accident—pure accident in the sense that such accident would entitle him to a complete acquittal. That is not what has been set up. The accused's evidence as I understand it, is that he was attacked and seized his arm in self defence and then kept up a struggle for some time and had control of that knife. He could have got away at the beginning. I do not think that this is a case in which I can say that there is such an accident on this evidence. That is my opinion of it. You are entitled to form your own of course. As far as I can see, there is no simple accident. He was intending to do something and his intention must be considered by his conduct: whether he had a murderous intention or whether he had simply an intention to do a minor injury or whether he had an intention to kill."

Thus the learned Judge clearly tells the jury that on the evidence the accused had an intention to do injury to the deceased.

The Judge concluded:

> "Why should a man hanging on to his arm such a long time to keep the fight going, and then suddenly let go? Does he let go with the intention only of releasing himself, as he says, or does he let go with the intention that the knife would come back and do some injury? Those are questions which you have to decide on the evidence."

The Judge did not expressly tell the jury that their verdict should be if they were of opinion that he let go only to release himself, but taking that part of the summing-up as a whole the impression which a jury would possibly get would be that in the first case there would be culpable homicide not amounting to murder, in the second case murder.

A defence of accident under s. 80 of the Penal Code was certainly not clearly left to the jury.

Mr. Butterfield in his clear argument to the Court submitted that the accused's statement to the magistrate and his evidence even if true disclosed no defence of accident and there was no other evidence on which such a defence could be founded.

The accused's explanation was put to the jury. On that explanation, if accepted, could accidental death have been founded?

Mr. Butterfield's point was that to let go the deceased's arm under the circumstances as described by the accused must reasonably be expected to cause the deceased's hand to come back and cause the throat wound, and that if this were so the occurrence was one which the accused could foresee and expect and therefore was not an "accident." He referred to *Hamilton, Fraser & Co.* v. *Pandorf & Co.*, 12 App. Cas. at p. 524 and to *Fenwick* v. *Schmalz*, L.R. 3 C.P. 313.

Stephens in his Digest of Criminal Law 3rd ed. at page 143 says "an effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it." See too *Rex* v. *Salmon*, 6 Q.B.D. 79. If the accused's story was true he had no intention of causing a deadly wound, and the wound—or any very serious wound was hardly to be expected as a consequence of suddenly

letting go of the deceased's hand. In any case this was a question for the jury to consider under the direction of the Judge, and this question was not left to them.

The knife which caused the deceased's wound was a heavy knife with a broad blade coming to a point and with one sharp edge.

To this Court it is doubtful whether the wound could have been inflicted in the manner described by the accused, but it was for the jury to consider whether it was caused in this manner, whether the accused intended the wound or a similar wound to be inflicted, and if not, whether the wound was such as might reasonably have been expected to result from suddenly releasing the arm of the deceased. These questions were not left to the jury.

Is this then a case to which the proviso to s. 6, sub-s. 1 of the Court of Criminal Appeal Ordinance can be applied? Would the jury have convicted had the defence of accident been fully put to them? *Rex* v. *Dyson*, 1 Cr. App. Rep. at p. 15. *Rex* v. *Stoddart*, 2 Cr. App. Rep. at 245.

The proviso must be used with great caution especially when the defence has not been fully placed before the jury by either Judge or counsel.

Had the appellant been convicted of murder after a full and adequate summing-up this Court would not have quashed the conviction. But here a defence raised in the accused's evidence has not been adequately put and this Court cannot say that the evidence was "so cogent and convincing that the conclusion is not to be resisted that the jury properly directed, would certainly have arrived at the same conclusion.

The conviction is quashed.

Appeal allowed.

[COURT OF CRIMINAL APPEAL]

McELWAINE, C.J., MILLS & PEDLOW, J.J.

August 25, 1938.

REX v. TAN CHU CHOOI.

[SINGAPORE CRIMINAL APPEAL No. 22 of 1938]

The Penal Code (Cap. 20), s. 489B—Using as genuine counterfeit currency notes—S. 224,—Escaping from lawful custody—Criminal Procedure Code, (Cap. 21), s. 448—Misjoinder of charges.

An accused was charged under s. 489B of the Penal Code with the offence of using as genuine forged currency notes having reason to believe the same to be counterfeit. He pleaded not guilty. At his trial he was charged not only with the above offence but on a second count for escaping from lawful custody an offence punishable under s. 224 of the Penal Code, to which he also pleaded not guilty. He claimed trial on both charges. Evidence was given in support of each charge. The Jury brought in a verdict of guilty on the first charge and the second charge was then withdrawn by the Crown Counsel who was prosecuting.

Held, that the joinder of the two charges was illegal and could not be legalised under s. 448 of the Criminal Procedure Code. The time for ascertaining whether or not there is a misjoinder is at the time when the accusation was made and not when the trial was concluded. It was immaterial that the misjoinder did not prejudice the appellant as the evidence of escape from custody could have been given as part of the evidence to substantiate the first charge.

CRIMINAL APPEAL.

Appellant in person.

Butterfield, Crown Counsel for the Crown.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

The judgment of the Court of Criminal Appeal (**McELWAINE, C.J., MILLS & PEDLOW, JJ.**) was delivered by—

McELWAINE, C.J.—The appellant appeals against his conviction on a charge under s. 489 B of the Penal Code of using as genuine eight counterfeit ten dollar notes of Straits Settlements currency having reason to believe the same to be counterfeit.

The defence was that he made payment of an account with these notes which the appellant (who kept a pork butcher's shop) had received in the ordinary course of his business.

It is unnecessary to say more about the charge than this, there was some evidence to go to the jury.

It appears, however, that at his trial the appellant was charged not only with the above offence but in a second count with an offence of escaping from lawful custody, an offence punishable under s. 224 of the Penal Code.

The appellant claimed trial on both charges. Evidence was given in support of each charge.

In summing up the learned trial Judge directed the jury on the first charge only. After the jury had brought in a verdict of guilty on the charge of using the counterfeit notes the following dialogue took place:

"His Lordship:—What about the other charge? Had it better be put to him?

Crown Counsel:—He did claim trial, my Lord, on the opening day and gave an explanation.

His Lordship:—Tan Chu Chooi, you have been found guilty on the first charge; do you still claim to be tried about the escape?

Accused:—I am not guilty, my Lord, on the second charge.

Crown Counsel:—With your Lordship's permission I think I will withdraw it.

The accused was then discharged on the second charge.